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Of Attorneys for Defendant Western Pacific
Mutual Insurance Company

UNITED STATES DISTRICT COURT
DISTRICT OF WASHINGTON
RICHLAND DIVISION

**HB DEVELOPMENT, LLC, a
Washington limited liability
corporation; FRASER HAWLEY,
and individual; SHARON BROWN,
an individual and the marital estate
thereof,**

Plaintifs,

v.

**WESTERN PACIFIC MUTUAL
INSURANCE, a foreign insurance
company; LOCKTON RISK
SERVICES, a foreign insurance
company; FIRST MERCURY
INSURANCE COMPANY, a
foreign insurance company,
WESTERN WORLD INSURANCE
COMPANY, a foreign insurance
company, DOES 1-10 INSURANCE
COMPANIES, and DOES 11-25
INSURANCE BROKERS,
CLAIMS ADMINISTRATORS,
AND INSURANCE AGENTS,**

Defendants.

Case No. CV-13-5050-EFS

**WESTERN PACIFIC MUTUAL
INSURANCE'S NOTICE OF
REMOVAL**

1 TO: The Judges and Clerk of the United States District Court in and for the
2 Eastern District of Washington at Richland

3 AND TO: Plaintiffs and Their Counsel

4 AND TO: All Other Parties

5 Defendant Western Pacific Mutual Insurance Company ("Western Pacific")
6 hereby gives notice that this action is removed to the United States District Court
7 for the Eastern District of Washington at Richland from the Superior Court of
8 Washington, in and for Benton County. Pursuant to 28 U.S.C. § 1441, defendant
9 further states as follows:

10 **State Court Action:** Western Pacific is a defendant in a civil action filed in
11 the Superior Court of Washington, in and for Benton County, styled
12 *HB Development, LLC; Fraser Hawley; Sharon Brown, v. Western Pacific Mutual*
13 *Ins.; Lockton Risk Services; First Mercury Ins. Co.; Clarendon National Ins. Co.;*
14 *Western World Ins. Co.*, Cause No. 13-2-00081-1 (the "State Court Action").

15 **Commencement of State Court Action:** The State Court Action was
16 commenced when plaintiffs' Amended Summons and First Amended Complaint
17 for Declaratory Judgment, Breach of Contract, Bad Faith, and Violation of the
18 Consumer Protection Act ("First Amended Complaint") were filed with the clerk
19 of the Benton County Superior Court, on or about March 28, 2013. Service of the
20 First Amended Complaint was effected on Western Pacific on or about April 5,
21 2013. This Notice of Removal is timely, in that it is being filed within thirty (30)
22 days of service of the First Amended Complaint upon Western Pacific. Neither
23 Western Pacific nor any other defendant has filed any pleadings in this case in the
24 Superior Court to date.

1 **Record in State Court:** The following pleadings constitute all of the
2 process, pleadings and orders received by Western Pacific in this action up to the
3 present time:

4 **Insurance Commissioner's Certificate of Service;**
5 **First Amended Summons;**
6 **First Amended Complaint for Declaratory Judgment, Breach of**
7 **Contract, Bad Faith, and Violation of the Consumer Protection Act;**
8 **Order Setting Civil Case Schedule.**

9 True and correct copies of the above pleadings Regarding Records and
10 Proceedings in State Court as Exhibit 1.

11 **Diversity of Citizenship is Basis for Federal Court Jurisdiction:** This
12 dispute between plaintiffs and defendants is a controversy between citizens of
13 different states.

14 Plaintiff HB Development is incorporated under the laws of the State of
15 Washington and at all times material hereto conducted business and maintained
16 their principal places of business in Benton County, Washington.

17 Plaintiffs Hawley and Brown are, and at all material times have been,
18 residents of the State of Washington.

19 Western Pacific Mutual Insurance is, and at all material times has been, risk
20 retention group chartered in the State of Colorado, with its principal place of
21 business in Littleton, Colorado.

22 Western World Insurance Company is, and at all material times has been,
23 incorporated under the laws of New Hampshire, with its principal place of business
24 in Franklin Lakes, Bergen County, New Jersey.

25

26

1 First Mercury Insurance Company is, and at all material times has been,
2 incorporated under the laws of Illinois, with its principal place of business in
3 Southfield, Michigan.

4 Clarendon National Insurance Company is, and at all material times has
5 been, incorporated under the laws of New Jersey, with its principal place of
6 business in New York, New York.

7 While Clarendon was served through the Washington Insurance
8 Commissioner's Office, it has not appeared and Western Pacific has been unable to
9 determine who should be contacted to obtain Clarendon's agreement to removal.
10 Due to the approaching removal deadline, Western Pacific is opting to file its
11 removal and will continue pursuing Clarendon's contact information with an eye to
12 obtaining Clarendon's agreement to removal. When that agreement has been
13 obtained, Western Pacific and/or Clarendon will file the appropriate
14 documentation.

15 Lockton Risk Services is, and at all material times has been, incorporated
16 under the laws of Kansas, with its principal place of business in Overland Park,
17 Kansas. However, it appears that Lockton Risk Services has not been served, and
18 thus agreement from this defendant is not required at this time. But counsel has
19 verified that regardless of whether Lockton Risk Services has been served, it
20 consents to removal.

21 Complete diversity exists between plaintiffs and defendants.

22 **Co-Defendants' Consent to Removal:** Counsel for Western Pacific has
23 conferred all defendants, except Clarendon, regarding removal. All those parties
24 conferred with have consented to removal of this action to federal court.

3 **Amount in Controversy:** Western Pacific believes and therefore alleges
4 that the monetary value relief plaintiffs seek in this action exceeds \$75,000:

5 a. Plaintiff HB Development alleges damages in excess of \$75,000 in its
6 First Amended Complaint:

21. As a result of Western and Lockton's negligence as well as all additionally named insured carriers failure to defend and indemnify HB against the claims . . . of Crooks, HB and its Members have been forced to incur defense costs, including, but not limited to, attorneys' fees, and has been exposed to demands for repair costs and other damages in an amount as yet to be specified but believed to be at least \$600,000.

* * *

15 27. As a result of this negligent action HB and its Members have
16 been damaged in an amount to be proven at trial but in any event more
17 than \$600,000.

b. Entry of declaratory judgment for plaintiffs may result in indemnification obligations exceeding \$75,000;

20 c. Plaintiffs' monetary damages for the alleged bad faith of three of the
21 defendants;

d. Plaintiffs seek an award of treble damages pursuant to RCW Ch. 19.86, which damages may equal \$25,000;

24 e. Plaintiffs seek prejudgment interest; and

25 f. Plaintiffs seek an award of reasonable attorneys' fees and costs.

26

1 Taking all these factors into consideration, Western Pacific reasonably
2 believes that plaintiffs seek damages and other recoveries counting toward the
3 jurisdictional minimum, aggregating in excess of \$75,000.

4 **Applicable Statutes:** This is a civil action over which this Court has
5 original jurisdiction pursuant to 28 U.S.C. § 1332, and the action is removable
6 pursuant to 28 U.S.C. § 1441(b).

7 **Concurrent Notice to State Court:** Western Pacific is concurrently filing a
8 copy of this Notice of Removal with the Clerk of the Benton County Superior
9 Court, pursuant to 28 U.S.C. § 1446(d).

10 DATED this 26th day of April, 2013.

11 MITCHELL LANG & SMITH LLP

12
13 By: 
14 Patrick J. Kurkoski, WSB No. 27908
15 Email: pjkurkoski@mls-law.com
16 Of Attorneys for Western Pacific Mutual
17 Insurance Company
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Western Pacific - Colo

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY**

HB DEVELOPMENT, LLC, a Washington)
limited liability corporation; FRASER HAWLEY,)
an individual; SHARON BROWN, an individual)
and the marital estate thereof,)

Plaintiffs,)

vs.)

WESTERN PACIFIC MUTUAL INSURANCE,)
a foreign insurance company; LOCKTON RISK)
SERVICES, a foreign insurance company;)
FIRST MERCURY INSURANCE COMPANY;)
a foreign insurance company; CLARENDON)
NATIONAL INSURANCE COMPANY, a foreign)
insurance company; WESTERN WORLD)
INSURANCE COMPANY, a foreign insurance)
company; DOES 1-10 INSURANCE COMPANIES)
AND DOES 11-25 INSURANCE BROKERS,)
CLAIMS ADMINISTRATORS AND)
INSURANCE AGENTS,)

Defendants.)

NO. 13-2-00081-1

**INSURANCE COMMISSIONER'S
CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that the Insurance Commissioner of the State of Washington has accepted service of

***FIRST AMENDED SUMMONS; FIRST AMENDED COMPLAINT; AMENDED NOTICE OF
RELATED CASES; CIVIL CASE SCHEDULE***

in the above-mentioned matter on APRIL 1, 2013, on behalf of and as statutory attorney for

Tracker ID 9867

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WESTERN PACIFIC MUTUAL INSURANCE COMPANY

an authorized foreign or alien insurer, and has forwarded a duplicate copy thereof to said insurance company pursuant to RCW 48.02.200 and 48.05.215.

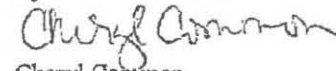
Receipt of the \$10 statutory service fee is acknowledged.

ISSUED AT OLYMPIA, WASHINGTON: APRIL 2, 2013

Certification No.: 91 7199 9991 7032 0089 6960

MIKE KREIDLER
Insurance Commissioner

By


Cheryl Common
Service of Process Coordinator

Original to:

JOHN R. HERRIG
ATTORNEY AT LAW
1030 N. CENTER PARKWAY, SUITE 302
KENNEWICK, WA 99336-7160

Copy to:

WESTERN PACIFIC MUTUAL INSURANCE CO.
SHERLYN FARRELL, VP
9265 MADRAS COURT
LITTLETON, CO. 80130

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

HB DEVELOPMENT, LLC, a Washing-
ton limited liability corpora-
tion; FRASER HAWLEY, an indi-
vidual; SHARON BROWN, an
individual and the marital
estate thereof,

No. 13-2-00081-1

FIRST AMENDED SUMMONS

Plaintiffs,

vs.

WESTERN PACIFIC MUTUAL
INSURANCE, a foreign insurance
company; LOCKTON RISK SERVICES,
a foreign insurance company;
FIRST MERCURY INSURANCE
COMPANY, a foreign insurance
company; CLARENDON NATIONAL
INSURANCE COMPANY, a foreign
insurance company; WESTERN
WORLD INSURANCE COMPANY, a
foreign insurance company; DOES
1-10 INSURANCE COMPANIES AND
DOES 11-25 INSURANCE BROKERS,
CLAIMS ADMINISTRATORS AND
INSURANCE AGENTS,

Defendants.

TO: WESTERN PACIFIC MUTUAL INSURANCE; LOCKTON RISK
SERVICES; FIRST MERCURY INSURANCE COMPANY; CLARENDON
NATIONAL INSURANCE COMPANY; WESTERN WORLD INSURANCE
COMPANY; WESTERN WORLD INSURANCE COMPANY; DOES 1-10
INSURANCE COMPANIES AND DOES 11-25 INSURANCE BROKERS,
CLAIMS ADMINISTRATORS AND INSURANCE AGENTS.

A lawsuit has been started against you in the above-

FIRST AMENDED SUMMONS -
Page 1

COPY

HERRIG & VOGT, LLP
1030 North Center Parkway, Suite 302
Kennewick, WA 99336
(509) 943-5691

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Western Pacific - Colo

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1 entitled court by HB Development, LLC and Fraser Hawley and
2 Sharon Brown, Plaintiffs. Plaintiffs' claims are stated in
3 the written Complaint, a copy of which is served upon you
4 with this Summons.

5 In order to defend against this lawsuit, you must
6 respond to the Complaint by stating your defense in writing,
7 and serve a copy upon the undersigned attorney for the
8 Plaintiffs within twenty (20) days after the service of this
9 Summons if you have been served within the State of
10 Washington, and within sixty (60) days if you have been
11 served outside of the State of Washington, excluding the
12 date of service, or a default judgment may be entered
13 against you without notice. A default judgment is one where
14 Plaintiff are entitled to what they asks for because you
15 have not responded. If you serve a Notice of Appearance on
16 the undersigned attorney, you are entitled to notice before
17 a default judgment may be entered.

18 You may demand that the Plaintiffs file this lawsuit
19 with the court. If you do so, the demand must be in writing
20 and must be served upon the Plaintiff. Within fourteen (14)
21 days after you serve the demand, the Plaintiffs must file
22 this lawsuit with the court, or the service on you of this
23 Summons and Complaint will be void.

24 If you wish to seek the advice of an attorney in this
25 matter, you should do so promptly so that your written.
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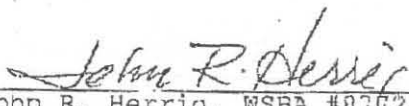
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1 response, if any, may be served on time.

2 This Summons is issued pursuant to Rule 4 of the
3 Superior Court Civil Rules of the State of Washington.

4 DATED this 26th day of March 2013.
5

6 HERRIG & VOGT, LLP

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8 
9 John R. Herrig, WSEA #0772
Attorneys for Plaintiffs
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

HB DEVELOPMENT, LLC, a Washing-
ton limited liability corpora-
tion; FRASER HAWLEY, an inci-
vidual; SHARON BROWN, an
individual and the marital
estate thereof,

Plaintiffs,

vs.

WESTERN PACIFIC MUTUAL
INSURANCE, a foreign insurance
company; LOCKTON RISK SERVICES,
a foreign insurance company;
FIRST MERCURY INSURANCE
COMPANY, a foreign insurance
company; CLARENDON NATIONAL
INSURANCE COMPANY, a foreign
insurance company; WESTERN
WORLD INSURANCE COMPANY, a
foreign insurance company; DOES
1-10 INSURANCE COMPANIES AND
DOES 11-25 INSURANCE BROKERS,
CLAIMS ADMINISTRATORS AND
INSURANCE AGENTS,

Defendants.

No. 13-2-00081-1

FIRST AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT, BREACH
OF CONTRACT, BAD FAITH, AND
VIOLATION OF THE CONSUMER
PROTECTION ACT

Plaintiffs, HB Development, LLC ("HB") and Fraser
Hawley and Sharon Brown for their claims against the de-
fendants, allege as follows:

FIRST AMENDED COMPLAINT FOR DECLARATORY
JUDGMENT -
Page 1

HERRIG & VOGT, LLP
1030 North Center Parkway, Suite 302
Kernersville, WA 99336
(509) 943-6691

PARTIES, JURISDICTION AND VENUE

1. HB was a Washington limited liability corporation and licensed as a general contractor who maintained good standing for all times relevant to this action with its principal place of business in Benton County, Washington.

2. HB brings this action under the authority of RCW 25.15.295(2(a)).

3. Fraser Hawley and Sharon Brown and the marital community thereof are residents of Benton County, Washington, and were members of HB Development, LLC and the successors in interest, intended beneficiaries and assignees of the policies, herein stated (hereinafter "Members"), to the extent that the duty to defend HB and indemnify HB for damages alleged against HB are allowed to be passed on to its Members.

4. Defendant Western Pacific Mutual Insurance ("Western") is believed to be a Colorado insurance company, doing business in the State of Washington.

5. Lockton Risk Services Company ("Lockton") is believed to be a foreign insurance company, doing business in the State of Washington.

6. First Mercury Insurance Company ("First Mercury") is believed to be an Illinois insurance company doing business in the State of Washington.

7. Clarendon National Insurance Company ("Clarendon") is believed to be a New York insurance company doing

1 business in the State of Washington.

2 8. Western World Insurance Company "(Western World")
3 is believed to be a foreign insurance company doing busi-
4 ness in the State of Washington.

5 9. DORS 1-10 insurance companies, the name of which
6 is currently unknown, but will be named upon disclosure.

7 10. DOES 11-25 insurance brokers, claims administra-
8 tors and insurance agents, whose names are currently un-
9 known, but will be named upon disclosure.

10 11. This is an action for declaratory judgment,
11 breach of contract, negligence, bad faith, and violation of
12 the Consumer Protection Act. This court has jurisdiction
13 over the subject matter and over the parties pursuant to
14 RCW 4.28.185 and RCW 7.24.

15 12. Venue in Benton County Superior Court is proper
16 pursuant to RCW 4.12.020 and RCW 4.12.025.

17 BACKGROUND

18 13. HB realleges paragraphs 1-12 above as though
19 fully stated herein.

20 14. On or about March 25, 2006 HB entered into a
21 written contract with John and Jolene Crook ("Crooks") for
22 construction of a single family residence located at 5450
23 Astoria Road, West Richland, Benton County, Washington.
24 ("the Project").

25 15. HB subcontracted with, among others, Valad's
26 Custom Plastering, LLC ("Valad's"), a Washington contrac-

1 tor; Amos Construction, Inc. ("Amos"), a Washington con-
2 tractor; Xtreme Drywall and Painting ("Xtreme"), a Washing-
3 ton contractor to perform various portions of the Project.

4 16. On or about January 23, 2012 the Crooks filed an
5 RCW Notice of Claim against HB and subsequently filed a
6 Second Amended Complaint against HB on April 25, 2012
7 alleging defects in construction, by various trades, to the
8 Project causing damage to the structure, loss of use and
9 unspecified personal injury to the Crooks, all in the
10 amount of damages to be proven at trial.

11 17. HB tendered the claim to Western and Western
12 declined coverage in a letter dated February 1, 2012. The
13 claim was re-tendered May 31, 2012 and January 7, 2013 and
14 subsequently also denied.

15 18. Beginning in April 24, 2012, HE also tendered, in
16 a timely manner, the claim demanding that First Mercury,
17 Clarendon and Western World ("the additionally named in-
18 sured carriers") provide defense and indemnity from the
19 demand as an additionally named insured as well as request-
20 ing a full copy of the policy in place.

21 19. All additionally named insured carriers requested
22 supplemental information, which HB repeatedly complied with
23 to the extent it was aware of the information requested.

24 20. All additionally named insured carriers denied
25 coverage, except Western World and, with the exception of
26 First Mercury and Western World, refused to further address

1 the tender or to submit the full policy of insurance as
2 requested.

3 21. As a result of Western and Lockton's negligence
4 as well as all additionally named insured carriers failure
5 to defend and indemnify HB against the claims of Crooks, HB
6 and its Members have been forced to incur defense costs,
7 including, but not limited to, attorneys' fees, and has
8 been exposed to demands for repair costs and other damages
9 in an amount as yet to be specified but believed to be at
10 least \$600,000.

11 CAUSES OF ACTION

12 First Cause of Action Against Western and Lockton:

13 NEGLIGENCE

14 22. Plaintiffs reallege Paragraphs 1 through 21 of
15 the Complaint.

16 23. Western and Lockton sold HB a claims-made policy
17 to comply with the Contractor Licensing Requirement pursu-
18 ant to RCW 18.27.050. Such a policy is null and ineffec-
19 tive for any occurrence during the license period unless
20 continually renewed. No such notice of the restriction was
21 delivered to the State of Washington as proof of compliance
22 with the statute.

23 24. Western and Lockton knew, or should have known,
24 that the license statute contemplated an occurrence-based
25 policy, otherwise leaving the public, HB and its Members
26 uninsured should the policy not be continually renewed for

1 a six-year statute of repose period.

2 25. Western and Lockton owed a duty to HB and its
3 Members and the public, when relying upon the statement of
4 insurance, that the period of coverage should be for any
5 occurrence during the policy period not cancellable for
6 that period by subsequent failure to renew.

7 26. Lockton and Western breached this duty to the
8 detriment of HB and its Members.

9 27. As a result of this negligent action HB and its
10 Members have been damaged in an amount to be proven at
11 trial but in any event more than \$60,000.

12 Second Cause of Action Against Western and Lockton:

13 VIOLATION OF THE CONSUMER PROTECTION ACT

14 28. HB realleges Paragraphs 1 through 27 of the
15 Complaint.

16 29. Western and Lockton's providing of inappropriate
17 policies to contractors for license compliance, specifically
18 ly HB and its Members, constitutes a violation of the
19 Consumer Protection Act, RCW 19.86.010, et. seq. Further
20 the policy ceased upon non-renewal rather than the limits
21 of WAC 284-20-040(6)(I)(i) & (ii).

22 30. As a result of defendants' violations of the
23 Consumer Protection Act, HB and its Members are entitled to
24 recover treble damages up to \$25,000, court costs and
25 attorneys' fees in an amount to be proven at trial.

26 //

1 First Cause of Action Against First Mercury,
2 Clarendon, and DOES 1-10:

3 DECLARATORY JUDGMENT

4 31. Plaintiffs reallege Paragraphs 1 through 30 of
5 the Complaint as though fully stated herein.

6 32. This matter is ripe for adjudication and a
7 justicable controversy exists regarding First Mercury and
8 Clarendon as to whether obligations for defense and cover-
9 age under the commercial general liability insurance poli-
10 cies where HB is named as an additionally named insured
11 provided by the additionally named insured carriers to HB
12 have been wrongfully denied by said carriers, and no satis-
13 factory remedy is available at law.

14 33. This matter is also ripe for adjudication and a
15 justicable controversy exists whether Western World, who
16 accepted the tender of defense February 19, 2013 ten months
17 after the initial tender, is liable to HB and its Members
18 for the undividable cost of defense incurred in that ten-
19 month period as opposed to a minimal amount as alleged in
20 the acceptance of tender.

21 34. It is believed, and therefore alleged, that the
22 policies, if produced by the carriers, are the type of
23 demand for which a duty to defend and/or indemnity coverage
24 is provided under the terms of the policies, and no legally
25 enforceable exclusions or limitations in the policies
26 eliminated that coverage.

1 35. It is believed, and therefore, alleged, that the
2 additionally named insured carriers are providing a defense
3 and/or indemnification under the same policies to the
4 subcontractors above named for the same claims of the
5 Crocks tendered by HB and its Members to the carriers.

6 36. The demand commenced and continued during the
7 effective policy periods of the policies.

8 37. HB and its Members are entitled to a declaration
9 that the additionally named insured carriers First Mercury
10 and Clarendon have a duty to defend and indemnify HB,
11 including its Members, in respect to the demand and as to
12 Western World, a duty to reimburse HB and its Members for
13 defense costs incurred from the date of first tender to
14 Western World in an amount of \$60,000 or such other amount
15 according to proof.

16 First Cause of Action Against First Mercury,
17 Clarendon, Western World, and DOPS 1-10:

18 BREACH OF WRITTEN CONTRACT

19 38. Plaintiffs reallege Paragraphs 1 through 37 of
20 the Complaint as though fully stated herein.

21 39. It is believed, and therefore alleged, that the
22 additionally named insured carriers breached the policies
23 with HB by failing to defend and indemnify HB and its
24 Members with respect to the demand.

25 40. As a result of the additionally named insured
26 carriers' breach of contract of the policies, HB and its

1 Members have suffered damages including, but not limited
2 to, defense costs, and have been exposed to damages in
3 respect to repair costs in an amount as yet to be specified
4 but believed to be at least \$100,000 or such other amount
5 according to proof.

6 41. The additionally named insured carriers are also
7 liable to HB and its Members for incidental and consequen-
8 tial damages resulting from the breaches of contract, in an
9 amount to be proven at trial.

10 42. The additionally named insured carriers are also
11 liable to HB and its Members for pre judgment interest,
12 costs and HB and its Members' reasonable attorneys' fees
13 incurred in bringing this action and any other damages
14 caused to HB by the additionally named insured carriers'
15 breach of contract.

16 Third Cause of Action Against Clarendon,
17 Western, Lockton, DOES 1-10 and DOES 11-15:

18 BAD FAITH

19 43. HB realleges Paragraphs 1 through 42 of the
20 Complaint as though fully stated herein.

21 44. Western, Lockton and the additionally named
22 insured carrier Clarendon had a duty under the policy to
23 investigate the demand, defend HB and its Members against
24 the demand and to provide HB and its Members with other
25 protection under the policy.

26 45. Western, Lockton and the additionally named

1 insured carrier Clarendon breached their duty to act in
2 good faith by:

- 3 (a) Failing to investigate the demand;
4 (b) Misrepresenting or refusing to present pertinent
5 insurance policy provisions;
6 (c) Refusing to defer HB and its Members with re-
7 spect to the demand; and
8 (d) By summarily and wrongfully denying their obliga-
9 tion to indemnify HB and its Members.

10 46. Western, Lockton and the the additionally named
11 insured carrier Clarendon's breaches of the policies were
12 unreasonable, frivolous or unfounded.

13 47. Western, Lockton and the additionally named
14 insured carrier Clarendon acted in bad faith and are es-
15 topped from denying coverage.

16 48. As a direct and proximate result of these breach-
17 es of good faith, HB and its Members have incurred damages
18 not fully compensable by contract damages in an amount to
19 be proven at trial. HB and its Members are also entitled
20 to recover their costs and reasonable attorneys' fees
21 incurred due to Western, Lockton and the additionally named
22 insured carriers Clarendon breaches of their good faith
23 obligation to HB and its Members.

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Third Cause of Action Against Clarendon,
Western, Lockton and, DOES 1-10 and DOES 11-25:

Consumer Protection Act

49. HB and its Members reallege Paragraphs 1 through 48 of the Complaint as though fully stated herein.

50. Clarendon, Western and Lockton's bad faith constitutes a violation of the Consumer Protection Act, RCW 19.86.010 et. seq.

51. Clarendon, Western and Lockton's conduct also violates WAC 284-30-330; WAC 284-30-360; WAC 284-30-670 and WAC 284-30-580.

52. Clarendon, Western and Lockton's violations of the Washington Administrative Code sections, above named, also constitute violations of the Consumer Protection Act.

53. With the exception of First Mercury, the additionally named insurance carriers' violations of the Consumer Protection Act, entitled HB and its Members to recover treble damages, court costs and attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. That the Court enter judgment against Western Pacific Mutual Insurance Company and Lockton Risk Services Company for damages in an amount to be proven at trial plus treble damages, attorneys' fees and cost of suit.

2. That the Court enter judgment in favor of HB and its Members declaring that the policies of First Mercury

1 Insurance Company, Clarendon National Insurance Company and
2 DOES 1-5 policies do provide coverage to HB and its Members
3 and thus impose a duty to defend and indemnify HB and its
4 Members against the demand. Further, that the Court order
5 them and each of them to defend and indemnify HB and its
6 Members against the demand.

7 3. That judgment be entered against First Mercury
8 Insurance Company, Clarendon National Insurance Company,
9 Western World Insurance Company, DOES 1-5 and each of them
10 in an amount to be proven at trial.

11 4. That the Court award treble damages authorized by
12 the Consumer Protection Act against Clarendon National
13 Insurance Company, Western Pacific Insurance Company,
14 Lockton Risk Services Company and DOES 1-5.

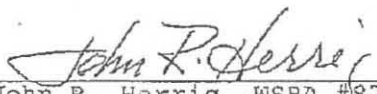
15 5. That HB and its Members be awarded their costs
16 and reasonable attorneys' fees in this action.

17 6. That HB and its Members be awarded pre-judgment
18 interest on all sums due HB and its Members.

19 7. For such other relief as the Court deems just and
20 equitable.

21 DATED this 26th day of March 2013.

22 HERRIG & VOGT, LLP

23
24 
25 John R. Herrig, WSBA #8772
26 Attorneys for Plaintiffs

HON. JUDGE MITCHELL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES

JOHN B. CROOK and JOLENE K.
BOUGHTON, a married couple,

Plaintiffs,

vs.

HB DEVELOPMENT, LLC, License No.
HBDEVL*972OZ, a Washington limited
liability company,

Defendant.

HB DEVELOPMENT, LLC, a Washington
limited liability company,

Third Party Plaintiff,

vs.

VALAD'S CUSTOM PLASTERING, LLC,
a Washington limited liability company;
XTREME DRYWALL AND PAINTING
CORP., a Washington corporation; SETH
AND ARACELLY ALVAREZ, d/b/a

NO. 12-2-00566-1

MOTION TO DETERMINE
REASONABLENESS OF
SETTLEMENT

Hearing Date and Time: April 12,
2013 at 8:30 a.m.

MOTION TO DETERMINE REASONABLENESS
OF SETTLEMENT

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1 XTREME DRYWALL & PAINTING;
2 BUILDER SERVICES GROUP, INC., d/b/a
3 GALE CONTRACTOR SERVICES, a
4 Washington corporation; AMOS
5 CONSTRUCTION, INC., a Washington
6 corporation; ALTON N. MACINNIS, d/b/a
7 MACINNIS CONSTRUCTION; FRED
8 CARLSON, JR., ELECTRICAL
9 CONTRACTORS, INC.; TRAVIS J.
10 MULLINS d/b/a AARROW PLUMBING;
11 FLOORS TO DYE FOR, INC., a
12 Washington corporation; and JOHN
13 DOES 1-15,

14 Third Party Defendants.

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HB DEVELOPMENT, LLC, a Washington
limited liability company,

Plaintiff,

vs.

MATHEW T. JOHNSON dba M AND C
CONSTRUCTION; WESLEY JAMES
CUSTOM CONCRETE and successor in
interest; WESLEY JAMES CONCRETE,
INC., a Washington corporation; TAYLOR
MADE SERVICE, INC., dba TAYLOR
MADE WOOD SPECIALTIES and JOHN
DOES 1-15,

Defendants.

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1 I. INTRODUCTION AND RELIEF REQUESTED

2 After a formal mediation in Seattle on February 22, 2013, and extensive
 3 continuing mediation efforts in March 2013, plaintiffs John Crook and Jolene
 4 Boughton reached a *Settlement Agreement, Assignment of Rights & Covenant Not to*
 5 *Execute* (hereafter "Settlement Agreement") with defendant HB Development, LLC
 6 ("HB") and its members Fraser Hawley and Sharon Brown. **Exhibit A** to
 7 Declaration of Kroontje. The Settlement Agreement contained an assignment of
 8 rights against certain insurers and subcontractors, a stipulated settlement amount of
 9 \$600,000, to be adjusted higher or lower as may be deemed reasonable by the Court
 10 as part of this motion, and a covenant not to execute against HB or its members,
 11 other than to seek recovery from specified assigned rights. Through mediation, all
 12 third party claims in this matter have been tentatively or finally resolved, with the
 13 exception of the claim against Valad's Custom Plastering, LLC.

14 John Crook and Jolene Boughton and HB now jointly move this Court,
 15 pursuant to RCW 4.22.060 and common law, for a determination that the settlement
 16 is objectively reasonable, and ask the Court to enter an Order declaring the
 17 settlement reached among plaintiffs, HB Development, LLC, and its members to be
 18 reasonable.

19 II. STATEMENT OF FACTS

20 HB was retained by John Crook and Jolene Boughton to begin construction
 21 of a single family residence ("Project") located on 5450 Astoria Road in West
 22 Richland ("Property"). Construction was to begin in November 2005. Instead, it
 23 began in early 2006 and HB initially worked without a specific written contract.
 24 Plaintiffs had never before entered into a construction contract. When Plaintiffs
 25 asked HB to enter a specific written contract, HB would only agree to sign its own
 26

1 Cost Plus Construction Contract ("Contract") or it would not otherwise continue
2 work on the Project.

3 Construction was well under way when Plaintiffs and HB entered the
4 Contract on March 25, 2006. Exhibit B to Declaration of Kroontje. The documents
5 specifically incorporated into the Contract were the plans, the specifications, cost
6 breakdown, site plan, and construction lien notice (Clause 4). HB did not provide
7 Plaintiffs with a copy of the "Warranty" or "RWC Warranty," referenced in the
8 Contract as having been supplied before signing of the Contract. Instead, HB led
9 Plaintiffs to understand that the warranty would afford them protection in
10 addition to that available under the Contract. Plaintiffs did not intend any
11 warranty to limit their protection or HB's liability.

12 HB contractually agreed as follows:

13 Clause 1: the house would be built in accordance with plans and
14 specifications;

15 Clause 20: all work on the Project would be performed in a good and
16 workmanlike manner, would be of good quality, and would be free
17 from faults and defects;

18 Clause 20: all work would be in conformance with all applicable
19 provisions of the building codes and zoning ordinances or any
20 governmental authority having jurisdiction over the dwelling; and

21 Clause 20: all materials, equipment, and installations would be new,
22 unless otherwise specified, and would be of good quality.

23 HB made several promises to Plaintiffs regarding the completion date for
24 the Project. September 2006 was the originally scheduled completion date so that
25 the home could be in the Parade of Homes which occurs annually in September.
26 HB's management of the project and problems with its subcontractors resulted in

1 approximately one year of construction delays before Plaintiffs could move in.
 2 Furthermore, HB did not complete or correct the items on Plaintiffs' inspection
 3 checklist ("Punch List"), despite being given reasonable notice and numerous
 4 opportunities to do so over a period of more than two years. According to the
 5 Contract, the Project is not complete until HB has completed the Punch List.
 6 Clauses 9 and 18. To date, Plaintiffs do not consider the Project to be complete as
 7 specified by the Contract.

8 In response to discovery requesting identification of the date of substantial
 9 completion for the Project, HB asserted that Plaintiffs took possession and their
 10 warranty period started on May 15, 2007. However, the City of West Richland
 11 issued a Certificate of Occupancy on September 10, 2007 (**Exhibit C** to Declaration
 12 of Kroontje) and the first indication that Plaintiffs may have received the RWC
 13 Warranty book was in February 2008, two years after the Contract was signed.
 14 **Exhibit D & E** to Declaration of Kroontje.

15 Between 2007 and 2009, several damage causing non-compliant, defective,
 16 and/or latent conditions were observed or discovered by Plaintiffs and reported to
 17 HB. In response, HB provided numerous assurances that these conditions would
 18 be corrected. The work, however, was delayed and not completed. **Exhibit F** to
 19 Declaration of Kroontje.

20 In 2009 and 2010, several more damage causing non-complaint, defective,
 21 and/or latent conditions were observed or discovered and reported by
 22 Construction Dispute Resolution ("CDR"), including but not limited to in the areas
 23 of the stucco cladding, decks, and main floor areas. CDR's first report was
 24 provided to HB. **Exhibit G** to Declaration of Kroontje.

25 HB was provided several opportunities since leaving the Project to repair
 26 the damage at the Property and bring the Project into compliance with the

1 Contract and all relevant codes, regulations, and industry standards, but did not
2 do so.

3 Since 2010, additional damage causing non-complaint, defective, and/or
4 latent conditions have been observed and reported by CDR. Exhibit I to
5 Declaration of Kroontje. All construction defect issues are summarized in the two
6 reports from CDR provided herewith as Exhibits G & I to Declaration of Kroontje.
7 CDR's general findings are corroborated by a separate report from Sound Exterior
8 Inspections, LLC (SEI). Exhibit H to Declaration of Kroontje. Recently, CDR
9 worked with Booth & Sons Construction to prepare a cost of repair estimate in the
10 amount of \$366,127. Exhibit J to Declaration of Kroontje.

11 In accordance with the Contract (clause 22) and state law, on January 23,
12 2012, Plaintiffs mailed their RCW 64.50.020 notice to HB ("Notice"), attaching
13 CDR's September 10, 2010 report and the parties' Contract. Included with the
14 Notice was a request for arbitration pursuant to the Contract. Clause 21 of the
15 Contract is an arbitration provision, agreement to which was voluntary. Both
16 parties initialed the provision and thereby agreed to submit disputes arising out of
17 the Contract to a single arbitrator.

18 On February 6, 2012, Plaintiffs were served with a response from HB's
19 registered agent in which HB stated it did "not intend to invoke any
20 responsibility." HB did not provide a response to Plaintiffs' request for arbitration
21 and the selection of an arbitrator.

22 Plaintiffs complied with the requirements of the Contract and RCW 64.50 *et*
23 *seq.* with respect to pre-litigation notice and the agreement to use a single
24 arbitrator to resolve any dispute arising out of the Contract.

25 On March 12, 2012, Plaintiffs brought suit against HB Development for
26 breach of contract, negligent installation of building products, inexcusable

1 construction project delays, breach of implied warranties, and breach of express
 2 warranties. HB, in turn, brought suit against Valad's Custom Plastering, LLC,
 3 Xtreme Drywall and Painting Corp., Seth and Aracelly Alvarez, d/b/a Xtreme
 4 Drywall & Painting, Builder Services Group, Inc., d/b/a Gale Contractor Services,
 5 Perfection Glass, Inc., Amos Construction, Inc., Alton N. Macinnis, d/b/a Macinnis
 6 Construction, Fred Carlson, Jr., Electrical Contractors, Inc. and Travis J. Mullins
 7 d/b/a Aarrow Plumbing, Floors to Dye For, Inc, and John Does 1-15 for breach of
 8 contract, negligence, and equitable indemnity. On January 11, 2013, Judge Mitchell
 9 consolidated Plaintiffs' case with a case brought by HB Development against certain
 10 suppliers/subcontractors: Mathew T. Johnson dba M and C Construction, Wesley J.
 11 Neal, dba Wesley James Custom Concrete, Wesley James Concrete, Inc., Taylor
 12 Made Service, Inc. dba Taylor Made Wood Specialties and John Does 1-15.

13 Through extensive and protracted mediation efforts to date, all of HB's
 14 claims against the subcontractors and material suppliers in the consolidated cases,
 15 with the exception of Valad's Custom Plastering, LLC, have settled, or have
 16 reached the stage of a tentative settlement confirmed with CR2A agreement
 17 between counsel. The rights to settlement funds received from these subcontractor
 18 settlements have generally been assigned to plaintiffs, pursuant to the terms of the
 19 settlement agreement that is the subject of this reasonableness motion. The rights
 20 to the claims against Valad's that continue in this litigation have been similarly
 21 assigned, and rights against certain insurers have also been assigned.

22 Trial in this matter is being continued to September 16, 2013 or a date
 23 thereafter.

24 On April 1, 2013, HB served on Plaintiffs a motion to amend its third-party
 25 complaint to add HB's members, Fraser Hawley and Sharon Brown, as third party
 26 plaintiffs. The motion is set for April 12, 2013 at 8:30 a.m., and is scheduled to be

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1 heard at the same time as this motion to determine reasonableness. Plaintiffs are
 2 providing notice of this motion to determine reasonableness to all interested
 3 insurers, subcontractors, and brokers against whom rights are being assigned, and
 4 these interested third parties may elect to participate in the hearing on April 12,
 5 2013 to voice any concerns regarding the reasonableness of the terms of the
 6 settlement agreement that is the subject of this motion.

7 III. STATEMENT OF THE ISSUE

8 Whether the *Settlement Agreement, Assignment of Rights & Covenant Not to*
 9 *Execute* is reasonable, and if the Court believes the amount of the settlement
 10 should be higher or lower than the \$600,000 agreed upon at the end of formal
 11 mediation in Seattle on February 22, 2013.

12 IV. EVIDENCE RELIED UPON

13 Plaintiffs rely upon this motion, the settlement agreement entered into based
 14 on the facts recited above, the Declaration of Maury Kroontje and the exhibits
 15 thereto, and the pleadings filed herein.

16 V. LEGAL AUTHORITY

17 A. A Reasonableness Hearing is Appropriate.

18 Pursuant to RCW 4.22.060, after written notice of the settlement agreement is
 19 given to all other parties and the court, "[a] hearing shall be held on the issue of the
 20 reasonableness of the amount to be paid with all parties afforded an opportunity to
 21 present evidence in order to secure a determination by the court that the amount to
 22 be paid is reasonable." RCW 4.22.060(1). Plaintiffs have properly given more than
 23 five days' written notice of the Settlement Agreement and reasonableness hearing
 24 to all parties in this case, satisfying RCW 4.22.060. See Notice of Presentation.

25 Plaintiffs have also provided notice of the Settlement Agreement and this motion to
 26 Western Pacific Mutual Insurance Company, Lockton Risk Services, First Mercury

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Insurance Company, Claredon National Insurance Company, Atlantic Casualty Insurance Company, and Western World Insurance Company. See Notice of Presentation and Declaration of Service. Plaintiffs are now properly requesting that the Court make a determination as to the reasonableness of the settlement.

The finding of reasonableness necessarily involves factual determinations, which will not be disturbed on appeal when they are supported by substantial evidence. Bird v. Best Plumbing Group, LLC, 161 Wn. App. 510, 525, 260 P.3d 209 (2011). The trial court's credibility determinations and its resolution of the truth from conflicting evidence will not be disturbed on appeal. Id.

B. The Amount of the Stipulated Judgment Against Settling Defendant is Reasonable.

At mediation in Seattle on February 22, 2013, with the assistance of construction law mediator Christopher Soelling, the parties to the settlement agreement at issue agreed upon the settlement figure of \$600,000, with the understanding that the Court could review that amount, and either raise or lower it if necessary, in the context of a reasonableness hearing. The calculation of the Settlement figure is as follows:

| Description | Documentation | Amount |
|---|---|--------------|
| Cost of Repairs (Repair of all construction defects and other issues as described in CDR reports, and related owner expenses.) | See CDR Reports provided as Exhibits G and I to Declaration of Kroontje, and related Summary of Booth and Sons Construction Estimates, provided as Exhibit J to Kroontje Declaration. | \$366,127.00 |
| Investigation and Expert (CDR fees to date.) | See Declaration of Kroontje. (Actual billing entries will be made available for Court's Inspection, or provided to | \$16,400.00 |

| Description | Documentation | Amount |
|--|---|--------------|
| | counsel in redacted form upon request.) | |
| Attorney Fees and Costs (Kroontje Law Office Attorney fees and costs to date.) | See Declaration of Kroontje. (Actual billing entries will be made available for Court's Inspection, or provided to counsel in redacted form upon request.) | \$56,682.33 |
| | Current Total: | \$439,209.33 |
| | Allowance for claims not pursued at mediation, including Pugel ¹ Damages, Construction Delay Damages, and future attorney fees and costs. | \$160,790.67 |
| | Mediated Settlement Amount: | \$600,000.00 |

In Glover v. Tacoma General Hospital, the Washington Supreme Court adopted the factors a court should consider in determining the reasonableness of a settlement under RCW 4.22.060. Glover v. Tacoma General Hosp., 98 Wn.2d 708, 717, 685 P.2d 1230 (1983). The Glover factors are as follows: 1) the releasing party's damages; 2) the merits of the releasing party's liability theory; 3) the merits of the released party's defense theory; 4) the released party's relative fault; 5) the risk and expense of continued litigation; 6) the released party's ability to pay; 7) any evidence of bad faith, collusion, or fraud; 8) the extent of the released party's investigation and preparation; and 9) the interests of the parties not released. Id. In Chaussee, the Court of Appeals adopted the same factors to determine the reasonableness of an assignment of coverage and bad faith claims by an insured in exchange for a covenant not to execute from a plaintiff. Chaussee v. Maryland Cas.

¹ Pugel v. Monheimer, 83 Wn.App. 688, 922 P.2d 1377 (1996).

1 Co., 60 Wn. App. 504, 511-12, 803 P.2d 1339 (1991). No one factor controls and the
 2 trial court has the discretion to weigh each case individually. Glover, at 717.
 3 Furthermore, all nine factors are not necessarily relevant in every case. Besel v.
 4 Viking Ins. Co. of Wis., 146 Wn.2d 730, 739, 49 P.3d 887 (2002).

5 1. Releasing Party's Damages

6 The damages incurred by Plaintiffs to date are substantial. Plaintiffs have
 7 agreed to settle with HB for the amount of \$600,000 as set forth above, which
 8 represents a reasonable sum within the range of admissible evidence of the
 9 damages that may be assessed against HB. Calculated at \$600,000.00, the damages
 10 represent an amount negotiated between Plaintiffs, HB, and its members following
 11 protracted litigation and mediation, and is reasonable in light of the significant
 12 damages suffered and evidence of damages that may be assessed against HB, and
 13 against HB's members in the event HB is unable to take financial responsibility.

14 2. Merits of the Releasing Party's Liability Theory

15 As alleged in the second amended complaint, Plaintiffs' claims against HB
 16 are for breach of contract, negligent installation of building products, inexcusable
 17 construction project delays, breach of implied warranties, and breach of express
 18 warranties. There is substantial evidence in the record to indicate that HB breached
 19 its contract, negligently installed building products, delayed the completion of
 20 construction by several years, and breached its express and implied warranties.

21 Breach of Contract

22 After construction was well under way, Crook and Boughton signed HB's
 23 Contract on March 25, 2006. Exhibit B to Declaration of Kroontje. HB breached the
 24 Contract when Plaintiffs' house was not built in accordance with plans and
 25 specifications, when the work was not performed in a good and workmanlike
 26 manner, was not of good quality, was not free from faults and defects, and was not

1 in compliance with building codes and industry standards, when the materials,
 2 equipment, and installation was not of good quality, and when the Project suffered
 3 years-long delays and mismanagement and is still not completed to date. See
 4 attached expert reports (Exhibits G, H, I to Declaration of Kroontje). Plaintiffs did
 5 not obtain the full benefit of performance based on the terms of the agreement and
 6 have suffered damages as a result.

7 HB further breached the Contract when it refused to submit to arbitration,
 8 despite specifically agreeing to the voluntary arbitration provision in its Contract
 9 (clause 21).

10 HB has tried to argue that the RWC Warranty (Exhibit E to Declaration of
 11 Kroontje) is part of the Contract. Although the RWC Warranty was referenced
 12 (Clause 20), it was not specifically incorporated into the Contract. See Clause 4 of
 13 the Contract. Furthermore, the Warranty was not provided to Plaintiffs until two
 14 years after the Contract was signed and, in any case, it is invalid, even if not
 15 determined by a court to be procedurally unconscionable. The cover page to the
 16 Warranty that Plaintiffs received years after the Contract was signed clearly states,
 17 "You do not have a warranty without the validation sticker." The Application for
 18 the State Specific Warranty that Plaintiffs signed also clearly states, "This warranty
 19 is invalid until a validation sticker, issued by RWC, is attached to the RWC
 20 warranty book." Exhibits D & E to Declaration of Kroontje. There is no validation
 21 sticker on the Warranty Plaintiffs received.

22 Even if the Warranty is found to be valid, a Court will likely hold the
 23 Warranty procedurally unconscionable. In Mattingly, there was a Home Buyers
 24 Warranty ("HBW Warranty"), which was determined to be procedurally
 25 unconscionable. The Court of Appeals explained that procedural unconscionability
 26 "relates to impropriety during the process of forming a contract and refers to blatant

1 unfairness in the bargaining process and a lack of meaningful choice." Mattingly v.
 2 Palmer Ridge Homes LLC, 157 Wn. App. 376, 388, 238 P.3d 505 (2010) (internal
 3 quotations omitted). Whether an agreement is unconscionable is a question of law.
 4 Id. The following factors are applied with regard to whether, in truth, a meaningful
 5 choice existed: 1) the manner in which the parties entered into contract, 2) whether
 6 the parties had a reasonable opportunity to understand the terms, and 3) whether
 7 the terms were hidden in a maze of fine print. Id.

8 The Mattinglys, similar to Plaintiffs in this case, did not receive a sample
 9 copy of the booklet to review before signing the enrollment application, they did
 10 not receive a copy of the booklet before they occupied the home, they believed the
 11 HBW Warranty would afford them protection *in addition* to that available under the
 12 construction contract, and they did not intend the HBW Warranty to limit their
 13 builder's liability under the construction contract. Id. at 391. Although the Court
 14 acknowledged that parties have a duty to read the contracts they sign, it
 15 emphasized that documents incorporated by reference must be reasonably available
 16 so the essentials of the contract can be discerned by the signer. Id. at 392. The
 17 Court also indicated that, even if the documents were available to the Mattinglys,
 18 the terms were buried in the booklet, appearing on page 7 of a 32 page booklet,
 19 despite being in bold and in a typeface larger than surrounding text. Id. at 391-92.

20 The Court of Appeals held the provisions in the warranty limiting liability
 21 and remedies to be unenforceable. The Court also held, *inter alia*, that there was a
 22 genuine issue of material fact as to when the builder completed the home,
 23 precluding summary judgment on issue of whether buyers brought action within
 24 one year contractual limitations period, and that the home was not completed for
 25 purposes of contractual limitations period until builder completed items on punch
 26 list. Id. at 392-96.

1 A Court is likely to find the RWC Warranty both invalid and procedurally
 2 unconscionable, given 1) the terms of the contract, 2) the conditions for validity set
 3 out by RWC, the very entity issuing the warranty, and 3) the Court's factors (i.e. the
 4 manner in which HB and Plaintiffs entered the Contract, the availability of
 5 incorporated documents, and the conspicuousness of the terms at issue).

6 Negligent Installation of Building Products

7 HB breached its duty to refrain from tortious and careless conduct that
 8 would place Plaintiffs at unreasonable risk of harm when it negligently installed
 9 building products, and negligently managed and maintained the Project. See
 10 Jackson v. City of Seattle, 158 Wn. App. 647, 660, 244 P.3d 425 (2010). Exhibits G,
 11 H, I & J to Declaration of Kroontje.

12 Inexcusable Construction Project Delays

13 Inexcusable delay is that delay for which the party assumes the risk of the
 14 cost and consequences. The most common inexcusable delay is delay caused by
 15 mismanagement of the project. In addition to liquidated damages, other damages
 16 available to someone injured by delay include labor or material escalation,
 17 increased procurement costs, costs associated with idle equipment, financing costs,
 18 lost opportunity costs, and interest.

19 HB mismanaged the Project and caused unreasonable and inexcusable
 20 delays, resulting in significant damages, including loss of use of Plaintiffs' premises.
 21 The Project is still not completed.

22 Breach of Implied Warranties

23 When a builder-vendor sells a new house to its first intended occupant, there
 24 is an implied warranty that the house complies with applicable building code
 25 requirements, was built in a workmanlike manner, and is suitable for habitation.
 26

1 The numerous construction defects discovered at the Property to date
 2 indicate that building code requirements were not complied with, the house was
 3 not built in a workmanlike manner, and, given the extensive water penetration
 4 issues, is not suitable for habitation. See attached expert reports (Exhibits G, H, I to
 5 Declaration of Kroontje).

6 By its acts, omissions, and representations, HB breached its implied
 7 warranties to Plaintiffs, including the warranties of habitability, fitness,
 8 merchantability, and good workmanship.

9 Breach of Express Warranties

10 HB made express warranties in the Contract (see, *inter alia*, Clauses 1 and 20).
 11 By its acts, omissions, and representations, HB breached its express warranties to
 12 Plaintiffs.

13 Given the merits of these theories of liability, the Settlement Agreement
 14 reached by Plaintiffs and HB is reasonable.

15 **3. Merits of the Released Party's Defense Theory**

16 HB answered the complaint on May 31, 2012, asserting twenty-four
 17 affirmative defenses. The parties have accounted for these defenses in determining
 18 the amount of the settlement.

19 **4. Released Party's Relative Fault**

20 HB potentially faces the lion's share of liability in this matter. The fact that
 21 HB retained subcontractors to do some of the work on the project does "not relieve
 22 it of its contractual obligation to produce a product free of defects and faulty
 23 workmanship." Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293,
 24 307, 914 P.2d 119 (1996). There can be "no question that the quality of work
 25 performed, both by [HB] as well as by its subcontractors, was the responsibility of
 26 [HB] and no one else." Mut. of Enumclaw Ins. Co. v. Patrick Archer Constr., Inc.

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1 123 Wn. App. 728, 736, 97 P.3d 751 (2004). Based on the fact that HB and its
 2 members may ultimately bear some, or all, of the fault attributed to the actions of its
 3 subcontractors, it is reasonable to include damages arising out of the conduct of the
 4 subcontractors in the amount of settlement.

5 5. Risk and Expense of Continued Litigation

6 Given that trial is at least approximately six months away, and given the
 7 inherent uncertainty of litigation, the stipulated settlement amount is less than the
 8 liability and expense exposure HB and its members might have faced if they had
 9 chosen to proceed. HB reasonably determined that entering into the Settlement
 10 Agreement was the most risk-averse strategy to avoid expenses, risks, and
 11 uncertainties of continued litigation. Choosing to settle for the stipulated judgment
 12 and assignment of rights was reasonable under the circumstances.

13 6. Released Party's Ability to Pay

14 HB's insurer, Western Pacific Mutual Insurance Company, has denied
 15 coverage for the damage claimed by plaintiffs. HB and its members may not have
 16 sufficient assets to pay out of pocket for the stipulated settlement amount.
 17 Choosing to settle and assign rights was reasonable under the circumstances.

18 7. Evidence of Bad Faith, Collusion, or Fraud

19 Washington courts have recognized that a covenant not to execute coupled
 20 with an assignment of rights and settlement agreement does not release a tortfeasor
 21 from liability; it is simply an agreement to seek recovery only from a specific asset
 22 of the insured, i.e. the proceeds of the insurance policy and the rights owed by the
 23 insurer to the insured. Besel v. Viking Ins. Co. of Wisconsin, 146 Wn.2d 730, 737, 49
 24 P.3d 887 (2002). HB tendered Plaintiffs' claim to Western Pacific Mutual Insurance
 25 Company and the subcontractors' insurers early in the litigation. The insurers have
 26 had ample opportunity to participate in the defense and resolution of this case,

1 including this reasonableness hearing. There is no evidence of bad faith, collusion,
 2 or fraud as to any parties involved or potentially affected by the Settlement
 3 Agreement.

4 8. Extent of Releasing Party's Investigation and Preparation

5 This case has been litigated since March 2012. The parties are getting ready
 6 for trial, which is approximately six months away. Extensive discovery has been
 7 conducted. Multiple expert reports have been generated. The parties have
 8 attended mediation. Short of going to trial, the parties have thoroughly
 9 investigated and prepared for this case.

10 9. Interests of Parties Not Released

11 Pursuant to several settlements throughout the litigation, the majority of
 12 HB's claims against its subcontractors have been resolved. All parties not released
 13 are being notified of the Settlement Agreement and the reasonableness hearing and
 14 will have an opportunity to be heard.

15 VI. CONCLUSION

16 The Settlement Agreement reached between Plaintiffs and HB was
 17 reasonable. When analyzed under the nine factor analysis set forth by the
 18 Washington Supreme Court, each factor supports this conclusion. For these
 19 reasons, the Court should find that the Settlement Agreement is objectively
 20 reasonable. If \$600,000 is not deemed reasonable, the Court should adjust the figure
 21 higher or lower in the interest of justice.

22 VII. PROPOSED ORDER

23 A proposed order granting the relief requested accompanies this motion.
 24
 25
 26

1
2 DATED this 3rd day of April, 2013.
3

4 KROONTJE LAW OFFICE, PLLC

5
6 By 

7 Maury A. Kroontje, WSBA No. 22958

8 maury@kroontje.net

9 Anamaria Turlea, WSBA No. 40138

10 anamaria@kroontje.net

11 Attorneys for Plaintiffs
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JOSIE DELVIN
BENTON COUNTY CLERK

JAN 11 2013

FILED

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES

HB Development, LLC

Plaintiff(s),

v.
Western Pacific Mutual
Insurance, et al

Defendant(s).

Case No. 13-2-00081-1

CIVIL CASE SCHEDULE ORDER
(ORSCS)I. SCHEDULE
(Week of 01/07/2013)

| | DUE DATE |
|---|------------|
| 1 Cancellation/Confirmation of Status Conference | 04/29/2013 |
| 2 Last Date for Filing Motions to Change Trial Date | 05/28/2013 |
| 3 Status Conference (telephonic) | 05/30/2013 |
| 4 Plaintiff's Disclosure of Lay and Expert Witnesses | 05/28/2013 |
| 5 Defendant's Disclosure of Lay and Expert Witnesses | 07/22/2013 |
| 6 Disclosure of Plaintiff's Rebuttal Witnesses | 08/05/2013 |
| 7 Disclosure of Defendant's Rebuttal Witnesses | 08/19/2013 |
| 8 Discovery Completed | 10/28/2013 |
| 9 Last Date for Filing Statement of Arbitrability | 10/28/2013 |
| 10 Last Date for Filing Jury Demand | 11/12/2013 |
| 11 Settlement Position Statements filed by all parties | 11/12/2013 |
| 12 Last Date for Filing Dispositive Pretrial Motions | 11/12/2013 |
| 13 Settlement Conference (in person) | 12/05/2013 |
| 14 Last Date for Filing and Serving Trial Management Report | 12/23/2013 |
| 15 Pretrial Management Conference (in person) | 12/26/2013 |
| 16 Trial Memoranda and Motions In Limine to be filed | 12/23/2013 |
| 17 Trial Date and Motions in Limine | 01/06/2014 |

II. ORDER

IT IS ORDERED that all parties comply with the foregoing schedule.

Dated this 11th day of January, 2013.


 SUPERIOR COURT JUDGE

NOTICE TO PLAINTIFF:

The plaintiff may serve a copy of the Case Schedule Order on the defendant(s) along with the summons and complaint. Otherwise, the plaintiff shall serve the Case Schedule Order on the defendant(s) within ten (10) days after the latter of: (1) the filing of the summons and complaint or (2) service of the defendant's first response to the complaint, whether that response is a Notice of Appearance, an Answer, or a CR 12 Motion.

cc:
John
Herrig

C/H

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Western Pacific Mutual Insurance Company's Notice of Removal** on the following parties:

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10 by mailing a true and correct copy thereof to said parties on the date stated below.

11 DATED April 26, 2013.

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13 
14 Patrick J. Kurkoski, WSB No. 27908
Of Attorneys for Western Pacific Mutual
15 Insurance
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